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Supreme Court, U.S.
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No. 98-1774

In the

Supreme Court of the United States

BAILEY A. JONES,
Petitioner,

v.

CITY OF BERKELEY RENT STABILIZATION BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioner Bailey A. Jones hereby replies to the Respondent's Brief in Opposition (Opp.) filed by respondent City of Berkeley Rent Stabilization Board (Rent Board) on June 4, 1999.

I

THE COURT MUST TAKE THIS OPPORTUNITY TO CLARIFY THE APPLICABILITY OF THE FIRST PRONG OF *AGINS*

The Rent Board's opposition, like the court below, directly repudiates this Court's regulatory takings doctrine. The Board's position is clearly set forth at the outset:

> While there is a place in takings analysis for the question of whether a challenged law substantially advances a legitimate state interest, that place presupposes a significant economic injury to a recognizable property interest.

Opp. at 3. This central theme is repeated throughout the opposition brief, *e.g.*:

> [A] Takings Clause plaintiff must show not only that a challenged enactment fails to substantially advance a legitimate state interest but also that the plaintiff has been deprived of substantially all use of or value of his property.

Opp. at 9. Thus, the Rent Board collapses the ***first*** prong of the regulatory takings inquiry enunciated by this Court in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (application of a property regulation effects a taking "if the ordinance does not substantially advance legitimate state interests"), into a subset of the ***second*** prong (application of a property regulation effects a taking if it "denies an owner economically viable use of his land"). This argument is not original with the Rent Board or with the court below. Instead, it represents the settled doctrine of the state courts of California--a doctrine that is wholly at odds

with this Court on a fundamental question of rights secured by the Fifth and Fourteenth Amendments to the Federal Constitution.

In its original formulation in *Agins*, this Court was clear that the two prongs of the regulatory takings analysis are disjunctive; a taking will be found if ***either*** prong is violated. This initial understanding has been underscored and applied by this Court on many subsequent occasions. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987) ("We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land'").

This Court emphasized the independence of the two prongs of *Agins* in *Yee v. City of Escondido*, 503 U.S. 519 (1992), noting that a first prong challenge

> does not depend on the extent to which [the property owners] are deprived of the economic use of their particular pieces of property.

Id. at 534. Similarly, Justice Scalia noted in his concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), "[k]nowing the nature and character of the particular property in question, or the degree of its economic impairment, will in no way assist" in determining whether a taking has occurred under *Agins*' first prong. *Id.* at 18-19 (Scalia, J., concurring in part and dissenting in part).

Nevertheless, these repeated clear statements of the independent viability of *Agins*' first prong have been ignored and repudiated by the California courts. In *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995), the California Court of Appeal broke with this Court and proclaimed that it would apply *Agins* as if the two prongs were *conjunctive* rather than, as this Court has always required, *disjunctive*. *Id.* at 1079. The resulting rule, which remains the doctrine of the California courts[1] and is now urged by the Rent Board in its opposition, is that a regulatory taking will only be found if the challenged measure or action fails to substantially advance legitimate state interests *and* deprives an owner of economically viable use of his property.

The difference between this Court's *Agins* formulation and the distortion of that doctrine applied to federal takings claims raised in California courts is best depicted graphically:

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[1] *See, e.g., Landgate v. California Coastal Commission*, 953 P.2d 1188, 1198 (Cal. 1998) (no taking where plaintiff has been temporarily deprived of ***all*** economically viable use of his property, so long as there is a "sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter").

UNITED STATES SUPREME COURT	*Does the government action substantially advance legitimate state interests?*		
		Yes	No
Does the government action deprive an owner of economically viable use of his land?	Yes	Taking	Taking
	No	No Taking	Taking

CALIFORNIA COURTS	*Does the government action substantially advance legitimate state interests?*		
		Yes	No
Does the government action deprive an owner of economically viable use of his land?	Yes	No Taking	Taking
	No	No Taking	No Taking

Under this Court's *Agins* formulation, the application of a restrictive property regulation will survive a takings challenge only if it ***both*** substantially advances legitimate interests ***and*** does not deprive the owner of economically viable use. Under the doctrine of the California courts, as advocated by the Rent Board's opposition brief, the same regulatory intrusion would survive a Fifth Amendment takings challenge if it ***either*** substantially advances legitimate interests ***or*** does not deprive the owner of economically viable use. Opp. at 3-5, 7-8, 9. Plainly, this is an inadequate level of protection of rights

supposedly guaranteed by the United States Constitution. As one commentator has pointed out,

> While *Agins* and its progeny increased the burdens placed upon land use regulators to ensure that individual citizens were not singled out to disproportionately bear the costs of implementing societal goals, adoption of the conjunctive standard [by the California courts] effectively eliminates that burden.

Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights--The Conjunctive Application of the Agins v. Tiburon Disjunctive Test*, 27 Pac. L.J. 1657, 1693 (1996).

II

THE CONFLICT AMONG THE STATE AND FEDERAL COURTS ON THE VIABILITY OF REGULATORY TAKINGS CLAIMS BROUGHT UNDER THE FIRST PRONG OF *AGINS* IS SPREADING AND DEMANDS THE PROMPT ATTENTION OF THIS COURT

The Rent Board does not--indeed, it cannot--dispute the existence of fundamental conflicts among the state and federal courts on the constitutional issue raised by this case. *See* Petition for Certiorari at 12-16. The Board's attempts to distinguish these cases merely emphasize how deep the conflicts run. For example, the opposition brief tries to minimize the conflict with *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), by observing that "it was logically impossible" for the ordinance challenged in that case to substantially advance its stated purpose. Opp. at 16. Thus, the Board finds it appropriate for a court to hold a rent control law unconstitutional under Agins' first prong by *weighing the measure's logic*, but would bar access to the courts to plaintiffs like Jones, who wish to advance an identical claim based on *factual evidence*. Surely this is a bizarre concept of the role of

the courts in adjudicating claims! *Richardson* clearly represents an irreconcilable conflict between the Ninth Circuit Court of Appeals and the California state courts on the legal viability of *Agins*' first prong.

The Board is less creative in its attempt to distinguish the conflicting opinions of the New York Court of Appeals, merely asserting that these cases "involved laws notable for their severe effects on property owners." Opp. at 16. This of course begs two essential questions: whether the plaintiffs in those cases alleged violations of *Agins*' first prong and, if so, whether the highest state court of New York found such allegations sufficient to state a claim for a regulatory taking. The answer to both those questions is "yes." In *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), the state's high court devoted a major part of its opinion to ruling that Local Law 9 effected a taking by violating *Agins*' first prong--a standard the court clearly stated to be independent of the other "threshold test" for a regulatory taking, deprivation of economically viable use:

> It is basic . . . that such a burden-shifting regulation of the use of private property will, ***without more***, constitute a taking: (1) if it denies an owner economically viable use of his property, ***or*** (2) if it does not substantially advance legitimate State interests. ***Either*** would be sufficient to invalidate a property-use regulation.

Id. at 1065-66 (emphasis added) (citations omitted).

Similarly, the New York court addressed the constitutional question at issue in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), in the following terms:

> The precise issue for us to decide is whether chapter 940 of the Laws of 1984 substantially advances a legitimate State interest, justifying the State's imposition of distinctive encumbrances and obligations on plaintiffs' private property rights.

Id. at 480 (citations omitted). Indeed, the Court of Appeals found it ***irrelevant*** that the plaintiff was not deprived of economically viable use of its property, since the sole basis of the complaint was a violation of *Agins'* first prong:

> No amount of extensive and virtually exclusive exploration of economic recalibration of the test, as an expectation for the future, can change that central controlling feature under reasonably clear precedents and principles. To take State action as with the challenged statute, the State must show a legitimate, substantial State interest that is closely, causally related to the action undertaken. The Constitution forbids State action by fiat, no matter the economic equation.

Id. at 486. It is essential for this Court to address the fundamental conflict between the California courts, the Ninth Circuit, and the highest court of New York on the crucial issue of federal constitutional law implicated in this case. The confusion that reigns on this question throughout the Nation's judiciary was recently highlighted in a decision by the United States Court of Appeals for the Federal Circuit:

> A pivotal criterion governing whether a regulatory taking has occurred is the impact the regulatory imposition has had on the economic use, and hence value, of the property. If a regulation categorically prohibits all economically beneficial use of land there is, without more, a compensable taking. On the other hand, though it is not necessary to have a total wipeout before the Constitution compels compensation, if the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking.

Hendler v. United States, 1999 WL 294710 (Fed. Cir. 1999), at *12. This analysis plainly reads *Agins'* first prong out of the

takings question altogether, just as the California courts have done, but in conflict with the treatment of first prong cases by the Ninth Circuit and the State of New York.

The time has come for this Court to address this spreading conflict. Further delay will only bring further confusion into the regulatory takings doctrines of the various state and federal courts throughout the Nation.

CONCLUSION

For all the above reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be GRANTED.

DATED: June, 1999.

Respectfully submitted,

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